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No. 84-400

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARVIN L. WINNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was entitled to a jury instruction on the defense of entrapment.

1. Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to 18 months' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A1-A5).

The evidence at trial is summarized in the court of appeals' opinion (Pet. App. A2-A3). In early 1982, Lucian Debow, a retired policeman and acquaintance of petitioner, agreed to introduce federal law enforcement authorities to petitioner in exchange for reduction of state charges pending against him for receiving and concealing stolen property. Debow testified that shortly thereafter, on about March 1, petitioner telephoned Debow and asked for Debow's assistance in selling a handgun. Debow consented and

petitioner brought the gun — a .44 caliber Smith and Wesson revolver contained in a sock — to Debow's apartment and left it with him. Debow then contacted the authorities and, within the next day or two, ATF Agent Don Watson went to Debow's apartment and took possession of the gun. Debow then contacted petitioner and told him that he had a prospective buyer for petitioner's gun. Debow said he would introduce the buyer to petitioner at an automobile auction in Nashville. Pet. App. A1; Tr. 15-16, 50-56.

At the auction, Debow introduced Agent Watson to petitioner, telling him that Watson was interested in buying and selling guns. In a partially recorded conversation,[1] petitioner described certain characteristics of the revolver in question to Agent Watson, including the fact that it was an antique, and stated that he wanted $100 for it. He also asked Watson to return the sock in which the revolver had been wrapped. In addition, petitioner said that Watson would not have any problem disposing of the revolver in the Nashville area because it "had come from the desk of an old fellow" in Kentucky who rarely looked in the desk and "wouldn't miss it anyway." Pet. App. A3; Tr. 23-24, 30-31. Watson also opened the trunk of his car and displayed several weapons to petitioner, including the revolver in question, to create the impression that he was in fact a gun dealer. Petitioner then accepted a payment of $100 from Watson for the revolver. Tr. 23-25.[2]

Petitioner testified at trial that Debow was the possessor of the gun, that Debow had asked him to pretend that it belonged to him and to sell it to Watson for $100, and that he never had possession of the gun. Petitioner also claimed

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[1]Portions of the recording were of poor quality (Pet. App. A3 n.2).

[2]The parties stipulated that, as alleged in the indictment, petitioner was a convicted felon and the gun in issue had travelled in interstate commerce (Tr. 9).

that the only reason he had been able to discuss the gun's antique character and the fact that it was wrapped in a sock was that Debow had given him that information. Petitioner denied that he made the other statements about the gun that were attributed to him by Watson, even though some of those statements appeared on the transcript of the recording of the conversation. Tr. 64-73. Debow, Watson, and petitioner were the only witnesses at the trial.

2. On closing argument to the jury, defense counsel attempted for the first time to raise an entrapment defense. He was interrupted by the district court, however. The court observed (Tr. 96-97; emphasis added):

> Now, under these circumstances, you can't defend on entrapment, not in view of the testimony of the defendant.
>
> * * * * *
>
> [Y]ou have not made any request for entrapment. *There has been no evidence of entrapment*, and the defendant has denied the crime and the law is very clear on that.

The district court later overruled petitioner's objection to the omission of an entrapment instruction from the court's charge to the jury (Tr. 123).

The court of appeals rejected petitioner's contention that the denial of an entrapment instruction constituted reversible error. First, the court noted that the Sixth Circuit "adheres to the 'traditional' approach to the defense of entrapment, which mandates the defendant to admit 'each and every element of the crime' before availing himself of the defense." Pet. App. A3-A4, quoting *United States* v. *Bryant*, 716 F.2d 1091, 1094 (6th Cir. 1983), cert. denied, No. 83-5697 (Jan. 23, 1984). The court declined petitioner's "invitation to overrule Sixth Circuit precedent on this

issue" and "reaffirm[ed] the 'traditional' rule" (Pet. App. A5). But the court of appeals also stated that "a review of the record in its entirety makes it readily apparent that the jury completely discredited [petitioner's] own testimony. * * * The jury's ultimate resolution of the case evinces its decision to place greater weight upon the testimony of the prosecutor's witnesses in concluding that the government had met its burden of proof, beyond a reasonable doubt, that [petitioner] *had possession of the gun prior to the involvement of Debow and Watson in the scheme*" (*ibid.*; emphasis added).

3. There is no merit to petitioner's contention (Pet. 6-9) that this Court should review the decision below to resolve an asserted conflict among the circuits regarding the availability of the entrapment defense. As the court of appeals explained (Pet. App. A4), the majority of the circuits follow the Sixth Circuit in holding that a defendant must ordinarily admit commission of the offense charged before he is entitled to an entrapment instruction. See *ibid.* (citing cases). See also *United States* v. *Smith*, 629 F.2d 650, 652-653 (10th Cir.), cert. denied, 449 U.S. 994 (1980).[3] Petitioner asserts (Pet. 6-8) that in *United States* v. *Demma*, 523 F.2d 981 (1975) (en banc), the Ninth Circuit adopted a different position. See also *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc).

But even if this conflict exists, petitioner is not entitled to relief, because he could not have obtained an entrapment instruction even in a circuit that disagrees with the Sixth

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[3]Cf. *United States* v. *Haimowitz*, 725 F.2d 1561 (11th Cir. 1984) (the general rule requiring the defendant to admit commission of the offense applies, unless the government's own case contains substantial evidence of entrapment); *United States* v. *Garrett*, 716 F.2d 257 (5th Cir. 1983), cert. denied, No. 83-1226 (Apr. 16, 1984) (general rule applies at least when the proof of entrapment is contrary or repugnant to proof that the defendant is otherwise not guilty).

Circuit's approach. The settled principle, even in the circuits in which petitioner asserts that he would have fared better, is that a "defendant is not entitled to have the issue of entrapment submitted to the jury in the absence of evidence showing some inducement by a government agent *and* a lack of predisposition by the defendant." *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), cert. denied, No. 83-5661 (Dec. 5, 1983) (emphasis in original); see, *e.g.*, *United States* v. *Brooks*, 567 F.2d 134, 138 (D.C. Cir. 1977); *United States* v. *Buckley*, 586 F.2d 498, 501 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *United States* v. *DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). In this case, as the district court expressly stated (Tr. 96), there was "no evidence of entrapment." Petitioner testified that he never had possession of the gun; he offered no evidence tending to show that Debow or Watson induced him to take possession of it.

Moreover, as the court of appeals noted, the jury's verdict makes it clear that the jury would have rejected an entrapment defense in any event. Petitioner testified that he never possessed the weapon and merely acted as if he was the owner, at Debow's request; Debow testified that petitioner possessed the weapon before Debow and Watson became involved in the scheme at all. In convicting petitioner, the jury must have rejected his version of the events and chosen Debow's. Since petitioner could not possibly have been entrapped if he had already possessed the weapon before Debow and Watson became involved, the jury would necessarily have rejected an entrapment defense as well. Because petitioner would not be entitled to relief even in a circuit that did not require a defendant to admit the crime in order

to obtain an entrapment instruction, this case presents no occasion for this Court to resolve the asserted conflict.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

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[4]Petitioner also argues (Pet. 9) that the holding in this case and in the other recent Sixth Circuit decisions cited in the court of appeals' opinion (Pet. App. A4) conflicts with two earlier Sixth Circuit cases. The fact remains that the decision below is in accord with the long-standing Sixth Circuit rule and, in any event, the asserted intra-circuit conflict does not warrant the attention of this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

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